Western District of Louisiana
October 15, 2010

DISCOVERY

A. GENERAL

Discovery in criminal cases is governed by Fed.R.Crim.P. 16, the Jencks Act, 18 U.S.C. §3500 and Fed.R.Crim.P. 26.2, the constitutional obligation to disclose exculpatory and impeachment evidence as set forth in *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972), the Department of Justice guidance contained in USAM §§9-5.001; 9-5.100, and the Deputy Attorney General's January 4, 2010 Memorandum on Guidance for Prosecutors Regarding Criminal Discovery [Attachment 8-01]. In addition, many of our judges issue a Standing Discovery Order that governs discovery practice in cases pending on their docket. AUSAs need to be thoroughly familiar with all of these sources and are responsible for fully complying with them.

Since discovery is governed by specific statutes, rules, cases and policies, AUSAs should *never* use the phrase "open file discovery." The phrase, to the extent it still exists, is a relic from a by-gone era. In fact, "open file discovery" means different things to different people, and prosecutors, defense attorneys and judges will all have different notions about what will be disclosed. Indeed, even among AUSAs it never literally means "open file," as no one has ever disclosed every single item in a case file such as IRC memos and other internal notes and memoranda. And even if an AUSA intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production, and the AUSA will have unintentionally misrepresented the scope of the materials provided.

The policies and best practices described in this chapter offer additional guidance that are specific to this office, policies and practices that are designed to provide sufficient guidance to AUSAs while at the same time allowing AUSAs enough flexibility to exercise their best judgment in managing the discovery issues in a given case. At the end of the day, each AUSA is responsible for fulfilling all of the government's discovery obligations in each of his or her cases. As questions arise, AUSAs are encouraged to consult with Supervisory AUSAs, the Discovery Coordinator, or the Professional Responsibility Officer for additional guidance. The Federal Criminal Discovery Blue Book posted on USA Book is a valuable resource

and should be consulted regularly.

Each time a criminal file is opened in this office, the assigned AUSA must send a letter [Attachment 8-02] fully describing the government's discovery obligations to each case agent involved in the investigation.

B. FEDERAL RULE OF CRIMINAL PROCEDURE 16

Rule 16 provides the list of enumerated items which the government must produce in discovery. The rule is self-explanatory. In general, AUSAs should approach their Rule 16 discovery obligations with a view toward providing broad, comprehensive, and prompt disclosure.

1. Documents

Rule 16(a)(1)(E) requires the government to "permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items," if the item is within the government's possession, custody, or control and it is material to preparing the defense, the government intends to use the item in its case-in-chief, or the item was obtained from or belongs to the defendant. Items within the government's custody and control refer not only to the United States Attorney's Office, but any member of "the prosecution team." *See e.g., United States v. Scruggs*, 583 F.2d 238 (5th Cir. 1978) (government is not excused from Rule 16 obligation because documents were in possession of FBI prior to trial, rather than the U.S. Attorney's Office.) "The prosecution team" includes all federal, state and local law enforcement agencies and other government officials participating in the investigation and prosecution of the criminal case against the defendant. An AUSA should ask and is entitled to review an agent's case file to be certain that all discoverable materials have been produced.

As mentioned above in Section B, in deciding what items are within the scope of Rule 16(a)(1)(E), the AUSA should approach the decision with a view towards providing broad and comprehensive discovery.

In deciding how to logistically comply with Rule 16(a)(1)(E), the AUSA will need to make a judgment given the circumstances of a particular case. In many cases, it will be feasible to copy or scan each of the relevant items and provide them to the defendant in an electronic format. In other cases involving only a few items, it will

be feasible to simply provide the defendant with hard copies. However, in some cases the number of items may be so large that it is simply not feasible to copy or scan all of them, especially when the government only intends to introduce a much smaller number of them at trial. In such cases, the AUSA can allow the defendant to have full access to inspect or copy the records, while providing an electronic copy of the government's trial exhibits at a later date.

Best Practice: *AUSAs should approach discovery with a view towards providing broad and comprehensive discovery. If you find yourself on the fence in deciding whether a particular items falls within the scope of Rule 16(a)(1)(e), err on the side of disclosure.*

Best Practice: *AUSAs should review an agent's case file to be certain that all discoverable materials have been produced.*

2. Expert Reports

Rule 16(a)(1)(G) requires that the government provide to the defendant a written summary of any expert testimony that the government intends to offer under Fed.R.Evid. 702, 703 or 705. This summary "must describe the witness's opinions, the bases, and reasons for those opinions, and the witness's qualifications.

Rule 16(b)(1)(C) imposes a reciprocal obligation on the defendant, upon the government's request, regarding defense expert witnesses, if the defense has requested disclosure under Rule 16(a)(1)(G) and the government has complied. Government requests for reciprocal discovery should specifically request any expert witness reports.

3. Witness Lists

Rule 16 does not mandate disclosure of the names of witnesses in advance of trial. In fact, attempts to amend Rule 16 to compel the disclosure of the names of prospective witnesses by either side have been rejected by Congress. H.R.Conf.Rep.No. 414, 94th Cong., 1st Sess. 12 (1975). However, it is widely acknowledged that district courts have the discretion to grant a defense motion to compel disclosure of the government's witness list upon a showing that it is material to the preparation of the defense and reasonable in light of the circumstances. *United States v. Chaplinski,* 579 F.2d 373 (5th Cir. 1978).

Best Practice: *In the absence of a court order directing the government to do so, pre-trial disclosure of the government's witness list is rarely a good idea. Nevertheless, in the absence of any safety concerns for witnesses or victims, trial counsel sometimes may reach an informal reciprocal agreement to disclose at the end of a trial day the names of the witnesses to be called the following day, a practice that may allow for the efficient presentation of evidence.*

C. TITLE III EVIDENCE

In cases involving evidence obtained from wiretaps, the government is required under 18 U.S.C. §2518(9) to furnish each defendant with "a copy of the court order, and accompanying application, under which the interception was authorized or approved." Although not specified in the statute, the affidavit in support of the application, the sealing order and inventory should also be disclosed in discovery.

The government should provide the defense with a CD containing *all* intercepted conversations. Not every call needs to be transcribed, but transcripts of the calls the government intends to introduce at trial should also be provided to the defense.

Given that Title III evidence is often sensitive and widespread dissemination of it should be avoided, AUSAs should obtain a protective order that prevents disclosure of wiretap evidence beyond defense counsel and counsel's associates, and grants disclosure to defendants only through their attorneys.

The ten day progress reports and the call logs prepared by the monitoring agents are generally not discoverable, *see e.g., United States v. Abdul-Ahad,* 2009WL35473 (D.Minn. 2009), but there is also some authority to the contrary. *See e.g., United States v. Franco,* 585 F.Supp.2d 980 (N.D.Ohio 2008). Although we will argue as a legal matter that these items are not discoverable, there may be a very good reason that an AUSA should disclose them. For example, defense counsel will have a complete set of all intercepted recordings, but will not have a method–short of listening to every call–to easily and efficiently find the calls relevant to his client. In short, the call logs may be a road map that will be very useful in facilitating plea discussions.

However, AUSAs must be aware that call logs are never 100% accurate and often contain many errors. Any disclosure of the call logs to defense counsel should be made subject to a letter agreement in which counsel recognize that the logs are not

completely accurate, that they contain errors, that they are being provided for the sole purpose of facilitating discovery, and that they will not be used at trial.

Best Practice: *To facilitate plea discussions, an AUSA may provide defense counsel with a sampling of the most pertinent, inculpatory calls, while emphasizing that the government may use additional calls during trial.*

Best Practice: *If an AUSA decides to disclose the call logs to defense counsel, the disclosure should be made pursuant to a written agreement that sets forth the limited use which can be made of them.*

D. BRADY MATERIAL

AUSAs must be familiar with and conscientiously follow the Department's policy regarding exculpatory *Brady* information as set forth in USAM 9-5.100. *Brady* information is exculpatory evidence that is material to a finding of guilt or imposition of punishment. However, recognizing that it is sometimes difficult to assess the materiality of evidence before trial, the USAM requires that AUSAs must take a broad view of materiality and err on the side of disclosure. Indeed, the USAM requires disclosure of information beyond that which is "material." Any information that is "inconsistent" with any element of the crime charged, or that establishes a recognized affirmative defense, must be disclosed, "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant..." Likewise, information that "either casts a substantial doubt upon the accuracy of any evidence" that the AUSA will rely upon to prove any element of the offense, or that "might have a significant bearing on the admissibility of prosecution evidence," must be disclosed.

AUSAs should also remember that the disclosure requirement for exculpatory and impeachment evidence applies to information without regard to whether the information will itself constitute admissible evidence.

E. GIGLIO MATERIAL

Giglio v. United States, 405 U.S. 150 (1972) requires the government to disclose information which may be used to impeach witnesses called to testify by the government. AUSAs must be aware of the potential in every case that there exists *Giglio* information that relates to both law enforcement witnesses, non-law enforcement witnesses, and Fed.R.Evid. 806 declarants.

As to law enforcement witnesses, AUSAs should be thoroughly familiar with the office's *Giglio* Policy [Attachment 8-03] which establishes a procedure to be used in every case to make sure the government complies with our disclosure obligations while at the same time protecting the legitimate privacy rights of government employee's. The Criminal Division Chiefs are the *Giglio* Requesting Officers for our district.

As to non-law enforcement witnesses, the AUSA must conduct a complete review to determine whether *Giglio* information exists. Such information may include, but is not limited to, prior criminal history, prior acts under Fed.R.Evid. 608, prior inconsistent statements, any and all benefits provided to the witness, relocation assistance, consideration or benefits to third parties, known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive or recall events, animosity towards the defendant, or relationship with the victim.

If the testifying witness is a confidential informant (CI), cooperating witness (CW), human source (CHS) or source (CS), the AUSA is entitled to access the agency file for each testifying CI, CW, CHS or HS in order to review for discoverable information. This review should be of the entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential impeachment information.

Finally, AUSAs and agents should be aware of the duty to disclose "progressive truth-telling" on the part of a witness. Some witnesses give different factual accounts during the course of an interview or investigation. They may initially deny involvement in criminal activity, the information they provide may evolve, broaden, or change considerably over time. Material variances in witness statements must be disclosed, even if they occur within the same interview, and provided to the defendant as *Giglio* information.

Best Practice: *AUSAs should follow up to make certain that the law enforcement witnesses have signed and returned our office's standard Giglio disclosure letter, and that a copy is in the case file.*

Best Practice: *As part of an AUSA's search and review of potential Giglio material, the AUSA should directly ask each government witness during the pre-trial prep interview about the existence of any such material.*

F. JENCKS MATERIAL

The Jencks Act, 18 U.S.C.§3500 and Rule 26.2 require the government to disclose "witness statements" to the defense after the witness testifies on direct examination. As a practical matter, our office policy is to voluntarily disclose these statements three days before trial in order to facilitate the presentation of evidence.

The AUSA is responsible for assembling all of the statements of the witness that need to be disclosed. This includes any transcripts of grand jury testimony, written statements made by the witness or otherwise adopted or approved by him, e-mails, voice mails that are transcribed, letters, or substantially verbatim recital of an oral statement of a witness that was recorded contemporaneously. As with all disclosures, a record of precisely what statements are being disclosed should be prepared and transmitted with the Jencks material.

Statements of witness who will not be called to testify at trial are not Jencks material and should not be disclosed, unless they contain *Brady* material.

If a witness has testified before the grand jury, the witness may be shown a copy of his or her grand jury testimony for review. However, the witness should not be given a copy of the grand jury transcript to take with them.

Best Practice: *Absent a compelling reason not to do so, voluntarily disclose Jencks material three days before trial.*

Best Practice: *Do not show a witness a copy of an FBI 302, DEA 6, or other MOI regarding his interview with an agent. If the witness adopts or approves it, it will become Jencks material.*

G. SPECIAL CONSIDERATIONS: AGENT AND AUSA WORK PRODUCT

1. Reports of Interviews: FBI 302s, etc.

Rule 16(a)(2) specifically states that statements of prospective government witnesses are not discoverable except as required by the Jencks Act. Additionally, the rule does not permit discovery of reports, memoranda or other internal government documents prepared by case agents. As such, FBI 302s and similar interview memoranda are not provided as part of Rule 16 discovery. Of course, if

it is an interview of the defendant it becomes discoverable under Rule 16(a)(1)(A).

An FBI 302 or similar record of interview is not Jencks material as to the witness interviewed, unless the witness has somehow adopted or approved it, or unless the 302 is a substantially verbatim account of an oral statement of the witness, i.e. contains actual verbatim quotes.

An FBI 302 or similar record will become Jencks material if the agent who prepared it is called as a witness and the testimony pertains to information contained in the 302.

An FBI 302 or similar record will be discoverable if it contains *Brady* or *Giglio* material. If only portions of the interview memorandum are relevant, it is appropriate to carefully redact the irrelevant information, but each redaction must be obvious and apparent so that the defendant knows he is not receiving the complete memorandum.

Even though not discoverable, in a given case an AUSA may find it advantageous to disclose some or all 302s to the defendant for the purpose of facilitating plea discussions. This is a matter left to the judgment of the AUSA, although the decision must be made only after careful consideration. AUSAs must be aware that disclosure of 302s or similar records of interviews may jeopardize witness and victim privacy or safety if, for example, an incarcerated defendant in possession of FBI 302s decides to circulate them around the prison. Disclosure of 302s, when made only as a strategic matter rather than a discovery obligation, should be done with appropriate safeguards such as redaction or an agreement with defense counsel as to limited use. Consultation with a Supervisory AUSA is highly encouraged.

Best Practice: *Unless they become Jencks material or contain Brady/Giglio information, FBI 302s and other interview memoranda should generally not be disclosed to the defendant.*

Best Practice: *If an AUSA decides to disclose FBI 302s or other interview memoranda in a given case for strategic reasons, rather than as a discovery obligation, appropriate safeguards should be used to protect witness and victim privacy and safety.*

2. Agents' Rough Notes

AUSAs should advise agents and officers involved in a case to preserve all rough notes of interviews. Indeed, some of the Standing Discovery Orders in our district require the government to do exactly that. However, an agent's rough notes are not discoverable. Rule 16 does not grant a criminal defendant a right to preparatory interview notes where the content of those notes have been accurately captured in a type-written report, such as an FBI 302, that has been disclosed to the defendant, so long as the 302 contains all of the information contained in the interview notes. *United States v. Brown,* 303 F.3d 582 (5th Cir. 2002).

The rough notes should be preserved and may become discoverable if there is a discrepancy between the notes and the agent's formal report of interview.

Finally, be aware that if an agent refers to his rough notes prior to testifying or while testifying, the notes may be discoverable under Fed.R.Evid. 612.

Best Practice: *Advise case agents and officers to preserve all rough notes of interviews.*

3. Pre-Trial Interviews and AUSA Notes

Because information discussed during a pretrial interview often duplicates what was memorialized in an earlier interview memorandum, there is generally no need for a new memorandum of interview. However, AUSAs should advise agents before the trial prep interview begins that new and significant and/or materially inconsistent discoverable information must be disclosed to the defense and that the agent may be asked to prepare an interview memorandum memorializing the information.

If the pre-trial prep interview yields any *Brady* or *Giglio* information and the agent does not prepare a memorandum of interview, the AUSA must send a disclosure letter to the defendant providing the relevant discoverable information.

AUSAs should *never* participate in any witness interview without an agent being present as well. Otherwise, the AUSA could possibly become a witness in the case.

Best Practice: *Prior to a pre-trial prep witness interview, advise the agent that any new and significant and/or materially inconsistent discoverable*

information will need to be included in a new memorandum of interview.

Best Practice: *Never participate in a witness interview without an agent being present.*

H. RULE 404(B) EVIDENCE

Fed.R.Evid. 404(b) requires the government to "provide reasonable notice in advance of trial...of the general nature" of so-called "other crimes" evidence that it intends to introduce at trial. Many of the Standing Discovery Orders used in the district require that such disclosure be made at the same time as Rule 16 discovery.

Best Practice: *Even in the absence of a Standing Discovery Order dictating the time for disclosure, notice of intent to use Rule 404(b) evidence and its general nature should be provided at the same time as general Rule 16 discovery and documented accordingly.*

I. E-MAIL/ TEXT MESSAGES

E-mails and text messages are written records, preserved electronically, and they are governed by the same rules governing other written materials. E-mails and text messages from AUSAs, agents, witnesses, victims, and victim-witness coordinators may be discoverable under Rule 16, *Brady/Giglio,* or the Jencks Act. All "substantive" case-related e-mails and text messages must be printed out and maintained in the case file or otherwise electronically preserved so they can be reviewed for potential production in discovery. "Substantive" communications include factual reports about investigative activity, factual discussions regarding the merits of evidence, factual information obtained during the interview or interaction with defendants, witnesses, and victims, and factual issues relating to credibility.

AUSAs should instruct agents at the start of an investigation that they must preserve any substantive case-related e-mail and text messages, that they may be discoverable under Rule 16, *Brady/Giglio*, or the Jencks Act, and that the better practice is to write about substantive matters in more formal case reports and interview memoranda.

Best Practice: *AUSAs and agents should not use e-mail or text messages to relay substantive case-related information. E-mails and text messages will not be as complete as an investigative report, and may have the unintended effect of*

circumventing an agency's carefully developed procedures for writing and reviewing reports. Substantive written communications by agents should be in the form of an FBI 302, DEA 6, MOI, ROI, or other similar formal investigative report. On the other hand, AUSA/agent e-mails or text messages that relate only to logistical matters, such as the scheduling of meetings, or that are used to transmit an investigative report or affidavit, are properly categorized as non-substantive and may not be discoverable.

Best Practice: *All USAO and agency personnel should limit e-mail and text message exchanges with victims and witnesses to non-substantive matters such as the scheduling of interviews or notification of dates and time of hearings.*

J. PRACTICAL AND LOGISTICAL CONCERNS

1. Timing of Discovery

Rule 16 does not establish any particular time deadline by which discovery must be provided to the defense, but the various Standing Discovery Orders used in the district contain time deadlines. AUSAs must carefully adhere to these deadlines and notify the court if the deadlines cannot be met for some reason in a particular case. No standing order is issued in the Shreveport or Monroe Divisions, but as a matter of practice, discovery is usually provided prior to the first scheduled status conference with the Magistrate Judge.

The various Standing Discovery Orders also contain deadlines by which the government must disclose *Brady* information. These deadlines must obviously be complied with, but the Department's policy is that exculpatory information "must be disclosed to the defendant promptly after discovery and impeachment information should typically be produced at a reasonable time before trial to allow the trial to proceed efficiently." USAM §9-5.001 ¶D. Our policy is to disclose exculpatory information as quickly as possible, and impeachment information at whatever point you are certain the individual will be called as a government witness.

Rule 16(c) imposes on both parties a continuing duty to disclose additional discoverable evidence or material that comes to light *before or during* trial. In some cases, discoverable material may be inadvertently overlooked, missed, or even mistakenly characterized as non-discoverable. Some defense theories only become apparent at trial. In those instances, the AUSA should promptly disclose the information to the defendant.

Best Practice*: Disclose Brady information at the earliest possible time; disclose Giglio information as soon as you are certain that the individual will be called as a government witness at trial.*

2. Documenting Disclosure

It is essential that AUSAs have a reliable record reflecting discovery disclosures made to a defendant. Regardless of the size of the case, AUSAs must maintain an accurate and complete record of all documents and other evidence produced to the defense. In addition, AUSAs must keep a detailed record of all materials that are not produced, but made available to the defense for inspection, such as voluminous records, drugs, and firearms. In the absence of such a record, a court may very well presume that materials were not produced if the defendant claims not to have received it. On the other hand, good records will effectively refute a defense claim that certain information was not provided.

Best Practice: *All documents acquired during an investigation should be bate stamped upon receipt with a numbering system that will allow easy identification of the source of the document.*

Best Practice: *In document cases, discovery materials can be electronically scanned and transmitted to the defense on a disc. A duplicate of the disc will serve as a record of precisely what was disclosed.*

Best Practice: *In other cases, a written inventory detailing the items disclosed should accompany the delivery of the discovery. The materials can either be sent via certified mail to defense counsel's office or, if hand delivered, defense counsel should sign a copy of the inventory acknowledging receipt.*

3. Protective Orders

Often discovery materials provided to the defense contain sensitive information which, if disclosed to others, could put at risk the privacy or security of witnesses, lead to witness intimidation, or interfere with an ongoing investigation. Rule 16(d)(1) allows the court, upon the government's motion, to issue a protective order restricting dissemination and use of information provided in discovery, and/or requiring the return of such information at the end of trial.

Best Practice: *Defense counsel will often consent to a reasonably drafted protective*

order. The issue can be worked out in advance and presented to the court as a joint motion.

K. DEFENSE OBLIGATIONS

The defendant's obligation to provide reciprocal discovery under Rule 16(b) is triggered only if the defendant requests disclosure under Rule 16(a) and the government complies. Rule 26.2(a) requires the defense to produce witness statements, but only upon motion of the government. AUSAs should be aware that if they provide discovery without a defense request for it, they have inadvertently relieved the defense of its reciprocal discovery obligations. The Standing Discovery Orders used in the district contain a form for the defense to sign and file into the record requesting discovery.

Best Practice: *Be certain that a defense request for discovery is contained somewhere in the record prior to providing discovery.*

L. NATIONAL SECURITY MATTERS

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the

prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

M. DISCOVERY TRAINING

The Senior Litigation Counsel serves as our office's Discovery Coordinator. The Discovery Coordinator will serve as an in-house advisor with respect to discovery obligations, and will provide annual training on discovery issues to all AUSAs. This annual in-house training is mandatory for all Criminal Division AUSAs, and will satisfy the Department's annual requirement of two hours of training on professional responsibility.